In *Re Davis* [1947] 75 CLR 409, Starke J. at pages 418, 419 said in relation to the word "shall" in the following terms:

> The word 'shall' does not always impose an absolute and imperative duty to do or omit the act prescribed. The word is facultative: it confers a faculty or power ... The word 'shall' cannot be construed without reference to its context.

In my judgment, in the context of s. 3(i) of the Act, the word 'shall' is used to express that something must be done. Here, the defendants must state the places where the plaintiffs desire to reside in the immediate future. This was not done and it follows, therefore, that there has been a serious breach of the mandatory requirements of s. 3(i) of the Act, the effect of which is to render the restriction orders null and void. Put in another way, once a breach of a mandatory statutory requirement is established, the fact that the plaintiffs were not prejudiced is totally irrelevant. The maxim de minimis *curat lex* (the law does not concern itself with trifles) has no application in such a case as the breach of a mandatory requirement can never be said to be a trifling matter. It struck at the very core of the matter. This point goes to the plaintiffs.

The plaintiffs, for the reasons adumbrated above, should be released forthwith.

CHARLES MURIEL

v.

NEWACRES SDN. BHD.

HIGH COURT, KUALA LUMPUR
DATO' HJ. ABU MANSOR BIN ALI J.
[CIVIL APPEAL NO. R1-12-129 OF 1992]
19 JANUARY 1994

HOUSING DEVELOPERS: Claim for liquidated damages for late delivery - Date of delivery of vacant possession - Whether vacant possession can be given without connection of water and electricity supplies.

The plaintiff entered into sale and purchase agreements with the defendant on 15 May 1982 for the purchase of two lots of houses. It was a term of the agreement that the houses would be completed within 18 months of the signing of the sale and purchase agreements. The agreements also contained a clause for the payment of liquidated damages for late delivery.

The defendant failed to deliver the houses within the time stipulated and the plaintiff sought to recover damages. The learned trial Court Judge found that the date of delivery of vacant possession was at the expiration of 14 days after the receipt of the letter from the defendant enclosing the architect's certificate of final completion and awarded liquidated damages for a period of 36 days.

On appeal the plaintiff contended that at the time when the defendant issued their letter, water and electricity connections had not been provided to the premises and submitted that vacant possession can only be given when these two services can be connected after payment of the two deposits for their supply.

Held:

[1] Following the case of *Kandasamy a/l Sreenivasagam v. Syarikat Muzwina Development Sdn. Bhd.* [1990] 1 MLJ 15, the relevant date for the delivery of vacant possession should be the date water and electricity supplies were provided to the premises.

[2] The facts of the case show that on the date of the defendant's letter enclosing the certificate of final completion, water and electricity supplies had not been connected to the premises and the learned trial Judge was in error in dismissing the plaintiff's contention that the

houses were not ready for the delivery of vacant possession.

[3] As it was proven that the supplies were only connected to the respective premises on 10 October 1985 and 30 November 1985 respectively, the defendant's argument that the houses were ready to be handed over, by the issue of the architects certificate dated 1 December 1983, had to be rejected.

[Appeal allowed. Plaintiff granted judgment as prayed in the statement of claim].

Cases referred to:

Teoh Kheng Pin v. Newacres Sdn. Bhd. (Civil Appeal No R1-11-23-1991) (unreported) ***(refd)***

Kandasamy a/l Sreenivasagam v. Syarikat Muzwina Development Sdn. Bhd. [1990] 1 MLJ 15 ***(foll)***

S.E.A. Housing Corporation Sdn. Bhd. v. Lee Poh Choo [1982] 2 MLJ 31 ***(foll)***

Legislation referred to:

Housing Developers Rules (Control and Licensing) 1970

Subordinate Courts Rules 1980, O. 26A

For the appellant - Lorraine Cheah (Maidzuara with her); M/s Shearn Delamore & Co.

For the respondent - Colin Pereira; M/s Allen & Gledhill

JUDGMENT

Abu Mansor bin Ali J:

Perayu/defendan merayu terhadap keseluruhan keputusan yang diberi pada 19 Januari 1994 di mana setelah mendengar hujah daripada dua belah pihak saya telah membenarkan rayuan perayu dan saya telah memasukkan penghakiman seperti yang dipohon seperti berikut:

A. (i) for lot 1130
8/100 x 169, 625
x 660 days
365 days = RM24,537.53.

(ii) with interest at 8% p.a. from 11 October 1985 until realisation.

B. (i) Lot 1124
8/100 x RM173,255
x 711 days
365 days = RM26,999.30.

(ii) with interest at 8% p.a. from 1 Disember 1985 sehingga penyelesaian.

dengan kos di hadapan Mahkamah Tinggi dan juga di Mahkamah rendah kepada perayu/plaintif untuk taksiran. Defendan telah diberi kebenaran untuk merayu ke Mahkamah Agung di atas keputusan ini.

The appellant has 4 grounds of appeal in which if the appellant succeeds on ground No. 4, the appellant succeeds on grounds 1, 2 and 3. The appellant's Counsel takes all the grounds together and proceeds first with ground No 4. The central issue in ground No. 4 was whether vacant possession can be given to the appellant for both lots without the appellant being able to get water and electricity connections. The case for the appellant was that vacant possession could only be given to her when these two services can be connected after payment of the two deposits for their supply while the case for the respondent was that vacant possession meant when the appellant was as found by the learned Sessions Court Judge (see page 31 Rekod Rayuan) to have received letter dated 6 December 1983 and applying the presumption under clause 19 of the sales and purchase agreement at expiration of 14 days therefrom on 20 December 1983.

The facts of this case were not disputed and had been agreed to by both parties as follows:

1. The following issues are not disputed by both parties to this appeal:

(i) On 15 May 1982, the appellant entered into two sale and purchase agreements with the respondent, a housing developer, to purchase two three-storey compact houses known as Lot 1124 (at pages 37-64 of the record of appeal and marked as 'P1') and Lot 1130 (at pages 65-92 of the record of appeal and marked as 'P2').

(ii) By clause 18 of exhibits 'P1' and 'P2', the respondent covenanted and agreed that the construction of both Lots would be completed and ready for delivery of vacant possession to the appellant within 18 months from the date of the agreements that is on 14 November 1983.

(iii) Further the respondent agreed that in the event the two Lots are not ready for delivery of vacant possession within the said 18 months, the respondent would pay to the appellant liquidated damages calculated from day to day at the rate of 8% per annum on the purchase price of the two Lots from 14 November 1983 to the date of actual completion and

delivery of possession to the appellant. (See Clause 18 of 'P1' and 'P2').

(iv) The respondent failed to complete both Lots and to deliver vacant possession of the said Lots to the appellant on 14 November 1993.

2. On 2 November 1990 the Kuala Lumpur Sessions Court had, pursuant to an application under O. 26A of the Subordinate Courts Rules 1980, entered judgment in favour of the appellant/plaintiff for the sum of RM2,705.46 being liquidated damages for late delivery of vacant possession (of the two Lots) from 14 November 1983 to 20 December 1983 together with interest at the rate of 8% per annum. It was further ordered that the respondent/ defendant be given leave to defend as to the remainder of the claim by the appellant/plaintiff for liquidated damages for late delivery of vacant possession together with interest and costs as claimed in the statement of claim.
3. At the outset of the trial, Counsels for both parties agreed that the only question for determination by the High Court is the date of actual delivery of vacant possession to the appellant.

What remains as disputed however was when was vacant possession? The appellant contended in the case of Lot 1130 it was certainly on or about the date as given by the respondent in their letter dated 5 November 1985 "P7" at p. 99 of the appeal record - "This is to inform you that the relevant authorities .... have installed the relevant meter (water) to your property on 10 October 1985" - and not by any means 20 December 1983.

The appellant has taken 10 October 1985 as the date of vacant possession for the said lot and similarly for appellant's lot No. 1124 at p. 111 in respondent's letter dated 11 December 1985 exhibit "P15" of the record of appeal when the respondent notified the appellant that her water meter having been installed on 10 October 1985 and also electricity meter having been so installed on 30 November 1985. According to the appellant therefore these two above dates are the dates the Court should take as vacant possession having been given to the appellant i.e. for Lot 1130 on 10 October 1985 and for Lot 1124 only on 30 November 1985.

The appellant's Counsel contended that though the agreement for the purchase of these two lots were dated 15 May 1982 and come really under the Peraturan-Peraturan Pemaju Perumahan (Kawalan dan Pelesenan) 1970 and not Peraturan-Peraturan 1982 which came into force on 1 June 1982, nonetheless the appellant's Counsel contended the date for vacant possession for both Rules is the same since the definition of vacant possession in both Rules are the same. The appellant's Counsel then referred me to my written judgment on *Teoh Kheng Pin v. Newacres Sdn. Bhd.* Rayuan Sivil No. R1-11-23 Tahun 1991 (unreported) where I held in a case under the Peraturan 1970 vacant possession was after light and water were really in a position to be connected for it was the intention of Parliament "untuk memberi perumahan yang lengkap, sempurna dan teratur" and I decided thus:

> Memandangkan inilah tujuan Parlimen supaya matlamat atau tujuan ini dapat dilaksanakan maka saya membuat keputusan apabila segala-galanya telah sempurna barulah pemaju boleh menyempurnakan klausa 19. Sijil arkitek yang diberikan dibawah klausa 19 memberikan hakmilik kosong, mengikut kehendak Parlimen untuk memberikan perumahan yang sempurna, mestilah tertakluk kepada penyempurnaan tanggungjawab pemaju dibawah peraturan perumahan ini menyiapkan sambungan (mains) bagi api dan air supaya pembeli rumah boleh membayar deposit api dan air dan dengan itu sambungan dibuat kepada bekalan tersebut. Oleh itu saya membuat keputusan adalah munasabah dan wajar pemberian hakmilik kosong akan cuma boleh diberi oleh pemaju apabila api dan air boleh disambungkan kepada "main". Jika ini tidak dapat dibuat perumahan atau rumah pembeli tersebut belumlah dibina dengan sempurnanya.

I find merit in the argument of the appellant's Counsel that the learned Sessions Court Judge erred when the Court found at p. 31 of his grounds of decision that vacant possession was in fact given by the respondent to the appellant 14 days after the letter of the respondent dated **6 December 1983** i.e. 20 December 1983 thus giving damages for late delivery of only 36 days. In support of her contention the appellant's Counsel cited before me the case of *Kandasamy a/l Sreenivasagam v. Syarikat Muzwina Development Sdn. Bhd.* [1990] 1 MLJ 15 at p. 17 where my brother Judge Dato' Malek bin Ahmad J held:

> Since both Counsel left it to the Court, I held that the relevant date should be the date water and electricity were installed on 2 February 1989 following *Syarikat Lean Hup (Liew*

Brothers) Sdn. Bhd. v. Cheow Chong Thai which had been affirmed by the Supreme Court on 19 April 1989.

Following the same cited case this Court also upheld the appellant's Counsel's contention that the appellant had a right to withhold final payment as demanded at p. 103 of the Rekod Rayuan *vide* letter dated 27 February 1986 which payment was made under protest without prejudice to the appellant's pending action and it was only after this payment the respondent handed the appellant the keys. (See p. 105 of the Rekod Rayuan). The Court duly noted that the respondent's Counsel conceded that the date 27 February 1986 was the date when final settlement was made.

I also upheld the learned appellant's Counsel's argument that by reason of *S.E.A. Housing Corporation Sdn. Bhd. v. Lee Poh Choo* [1982] 2 MLJ 31, by which judgment this Court is bound to follow, any clause in the sale and purchase agreement not adhering to or contrary to Peraturan-Peraturan 1970 cannot be allowed. I find that clause 18 of the agreement of the parties cannot absolve the respondent from their responsibility of giving light and water connection in the time stipulated therein.

I allowed this appeal and entered judgment as prayed and by the same token I rejected the argument of the respondent that vacant possession was after the notice dated 6 December1983 giving the architect's certificate. It is clear that at p. 99 of the Rekod Rayuan water is only connected on 10 October 1985 when deposit was called for at p. 95 of the Rekod Rayuan on 16 August 1983 and at p. 98 of the Rekod Rayuan RM100 for light deposit was received by the respondent on 21 January 1985. At p. 96, a letter from the respondent to the applicant/plaintiff dated 23 September 1985 required the plaintiff to sign new forms for light to be re-submitted. All these facts clearly show to the Court that on 6 December 1983 the two lots were not ready to be given vacant possessions. I find that the learned Sessions Court Judge acted in error in not accepting the appellant's contention that the lots were not really ready for vacant possession to be given. The Court as stated rejected the argument of the respondent that the lots were ready to be handed by the architect's certificate dated 1 December 1983 (p. 102 of the Rekod Rayuan).

This Court accepted that there was a delay in the delivery on the 2 lots: (1) for Lot 1130 for period of 660 days and for Lot 1124 a delay of 711 days from 21 Deccember 1983 to 30 November 1985. Hence the Court allowed the appeal and gave judgment as prayed as stated above.